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UNCLAS SECTION 01 OF 02 ABUJA 002135

SIPDIS

PASS DOT FOR OIA, ALSO FAA

E.O. 12958: N/A

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SUBJECT: GON AVIATION MINISTER PROTESTS EMBASSY PRESS
BRIEFING ON VIRGIN NIGERIA AIRLINES

REF: (A) ABUJA 2118, (B) ABUJA 2119, (C) ABUJA 2121

1. Following is the proposed letter to Nigeria's Minister of Aviation mentioned in ref A.

2. Begin text.

Mr. Minister:

Thank you for your letter of December 21, 2004 in response to the media briefing on Virgin Nigeria by the U.S. Embassy's Economic Counselor on December 16 (FMA/20/2004/1/152). You have protested the briefing -- which the newspaper This Day publicized on December 17 -- for it was, in your words, an "unwholesome development whereby confidential governmental business and diplomatic matters are made subject of newspaper discourse."

Your assertion surprised me, since your Ministry's position on Virgin Nigeria has often been reported by your country's media services. On December 16, for example, The Guardian reported that at "the signing of a Memorandum of Understanding..., [Minister] Yuguda said that Virgin Nigeria would be granted an unspecified period of protection on the plum routes as [an] incentive for the investors." The Guardian further noted that you "ordered that the clause [conferring a seven year monopoly] be included in the agreement signed with Virgin Atlantic Airways, when the British carrier insisted it would not close the deal unless the demand was acceded to."

In your letter, you also referred to one dated October 14 (FMA//LU/2004/1/19) to which you said you were awaiting a reply. In the fourth paragraph of that letter, you stated that "I consider it most pertinent to provide further clarifications on the matter as certain representations... are unfortunately not reflective of the situation at hand." You then explained why you believe Virgin Nigeria Airways is substantially owned and effectively controlled by your government. You therefore expressed "deep concern about the attempts being made by the United States to link Virgin Nigeria... with the U.K. registered Virgin Atlantic Limited."

Toward the end of your letter of October 14, you asked my "understanding and cooperation in enlightening further the Government of the United States, its relevant authorities and agencies on the true position of the matter with a view to... paving the way for the prompt acceptance of the designation of the Nigerian flag carrier." Unfortunately, I did not conclude from your remarks that you were expecting a reply from me. On the other hand, U.S. Government officials consulted among themselves following their receipt of the detailed report on the meeting that you and the Embassy's Economic Counselor had on September 27. Those consultations led to the U.S. officials' decision to recommend the press briefing, the subject of your protest.

Mr. Minister, in paragraph nine of your letter of December 21 you stated that the "emphasis apparently being placed by the U.S. Government... is that the airline is an entirely Virgin Atlantic [UK]... matter. The newspaper report regrettably goes on to name some foreign airlines, which the United States expects Nigeria to partner with... without considering the issue of the sovereign rights of Nigeria to make its own decision on the choice of a suitable partner."

I assure you that the U.S. Government understands that Virgin Nigeria is not "entirely" a Virgin Atlantic affair. We know that the latter holds 49 percent of the equity. The U.S. Government also respects the right of the Government of Nigeria to choose its own partners in whatever ventures. The exercise of such rights may have implications for third parties, however. The Embassy Counselor mentioned foreign airlines nominally during the briefing to emphasize that those implications have greater or lesser import depending on the airlines' normal places of doing business.

In paragraph 11 of your letter of December 21, you indicated that "suffice it to state at this juncture that the report further referred to the proposed operations of Continental Air into Nigeria by April 2005 without taking into consideration the principle of reciprocity in the bilateral

air transport relations between the two sovereign countries. Such proposals by the United States in respect of its own designated airline may legitimately be attended on a quid pro quo basis." I infer that you meant to establish a direct link between Nigeria's recognition of Continental Airlines as a designated carrier by the United States, and the latter's recognition of Virgin Nigeria as your government's designated carrier, under our bilateral aviation services agreement (open skies). Establishing such a link would be neither in the spirit of our agreement nor in the interests of our respective countries.

Continental Airlines is substantially owned by citizens of the United States and under their "effective control." Effective control is a term employed by the U. S. Department of Transportation (DOT) in determining whether an airline meets the US citizenship requirements of US aviation law. DOT uses a two-pronged test for citizenship: whether at least 75 percent of the voting stock of the carrier is owned by US citizens (as well as the president and two-thirds of the board of directors of the carrier being US citizens), and whether the carrier is under the "effective control" of US citizens. The first prong is an objective numerical test. The second prong is subjective because there is no fixed legal definition of "effective control"; DOT looks at all of the factual circumstances involved in the management of the carrier and determines case by case where "effective control" lies. Generally, DOT distinguishes "apparent" control from "actual" control and, as a general proposition, it usually decides that the party that actually makes, or has the authority to make, the day-to-day operational decisions for the carrier is the party that is in "effective control" of the company.

In exercising its discretion, DOT considers public-policy factors including the impact of its determination on domestic and international competition. The latter point is important because the focus of U.S. aviation policy is to promote competition to benefit U.S. consumers. Because the relevant U.S. statute gives DOT discretion to define "actual control," DOT takes into account whether the United States has a liberal aviation relationship with the country the nationals of which want to do business with the United States. DOT interprets ownership and control requirements differently depending on the level of access U.S. carriers enjoy to the relevant foreign market. DOT does this to prevent free riding by a carrier from a country with which the United States has restrictive airline rights. As noted in paragraph five of your letter of December 21, the United Kingdom is a country whose aviation restrictions are adversely affecting the interests of the United States. The Ministry does not contest that Virgin Atlantic Limited, which holds 49 percent equity in Virgin Nigeria, is a UK-registered airline.

Mr. Minister, I hope I have clarified the U.S. Government's position to your satisfaction. I assure you that it, too, is committed to the faithful implementation of our Open Skies Agreement of August 2000. In your own words, we look to its being implemented "in the true spirit of the cordial relationship that exists between our two governments."

End text.

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